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No. 82-6881

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JAMES P. FREE, JR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Can the sentencing authority, after first finding the existence of an appropriate statutory aggravating factor, consider any relevant aggravating and mitigating factors in determining whether to impose a death sentence?

2. Whether the Illinois Supreme Court review procedure in death penalty cases complies with the requirements of the Eighth and Fourteenth Amendments.

3. Whether the fact that Illinois allows the prosecutor to make the decision whether to seek the death penalty violates the Eighth and Fourteenth Amendments.

4. Whether the Petitioner's claim that the protective sweep of his premises violates the Fourth and Fourteenth Amendments raises an issue of constitutional law.

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 94 Ill. 2d 378, 447 N.E.2d 218 (1983). A copy of the opinion has been attached to the Petition For Writ Of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

ADDITIONAL STATUTES INVOLVED

Illinois Revised Statutes, Chapter 38, par. 1005-3-2(a)(3):

> 1005-3-2. Presentence report
>
> § 5-3-2. Presentence Report. (a) the presentence report shall set forth:
>
> * * *
>
> (3) the effect the offense committed has had upon the victim or victims thereof, and any compensatory benefit that various sentencing alternatives would confer on such victim or victims; ....

STATEMENT OF THE CASE

The opinion of the Illinois Supreme Court, reported at 94 Ill. 2d 378, 447 N.E.2d 218 (1983), provides an adequate statement of additional facts to supplement the Petitioner's statement. The opinion is included as Appendix A of the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS CONSIDERED AND RESOLVED, IN FAVOR OF THE RESPONDENT, THE PRIMARY QUESTION ASSERTED IN POINT I OF THE PETITION. THE SECONDARY QUESTION, STANDING ALONE, DOES NOT RAISE A COGNIZABLE CONSTITUTIONAL CLAIM. BOTH THE PRIMARY AND SECONDARY QUESTIONS ASSERTED IN POINT I WERE NOT ADEQUATELY PRESERVED FOR REVIEW.

A.

This Court Already Has Approved Death Penalty Statutes Which, Like The Illinois Statute, Direct The Sentencing Authority, After First Finding The Existence Of An Appropriate Statutory Aggravating Factor, To Consider Any Relevant Aggravating And Mitigating Factors In Determining Whether To Impose The Death Sentence. Moreover, The Jury Was Properly Instructed Under The Illinois Statute.

Petitioner first contends that this Court should grant a Writ of Certiorari in this case to determine whether a sentencing authority in a death penalty case can constitutionally consider non-statutory aggravating factors in making its decision. He notes that this issue was before this Court in Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983), which has now been decided. In Barclay, this Court held that there is no constitutional infirmity in a death penalty hearing procedure which allows for the imposition of a death sentence, based in part on relevant non-statutory aggravating factors.

Moreover, as Justice Stevens noted on behalf of the Court in Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733, 2743 (1983):

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.

In Zant, this Court went on to conclude that, although evidence of prior assault convictions of the defendant could not be considered as a statutory aggravating factor in deciding the death penalty question (because of a state supreme court

opinion holding it too vague), the Eighth and Fourteenth Amendments do not prohibit the consideration of such evidence as a non-statutory aggravating factor, where a valid statutory aggravating factor has been found to exist. Id. at ____, 103 S.Ct. at 2749.

Thus, to the extent that this case would raise the issue of the constitutionality of a death sentence based in part on non-statutory aggravating factors, the Respondents submit that the issue has been resolved by this Court. The Illinois statute is essentially indistinguishable, in this regard, from the Georgia statute which was originally approved in Gregg v. Georgia, 428 U.S. 153 (1976) and reviewed with approval in Zant v. Stephens.

In Gregg, this Court noted that under the Georgia statute:

> [t]he judge is also required to consider or to include in his instructions to the jury 'any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in the statute.

Gregg v. Georgia, 428 U.S. 153, 164-165 (1976).

The Illinois statute (Ill. Rev. Stat. 1981, ch. 38, par. 9-1) setting forth the procedure for determining whether a death sentence shall be imposed states:

> (e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) [the statutory aggravating factors] may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.
>
> (f) Proof. The burden of proof of establishing the existence of any of the factors set forth in Subsection (b) [the statutory aggravating factors] is on the State and shall not be satisfied unless established beyond a reasonable doubt.

> (g) Procedure - Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) [the statutory aggravating factors] exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) [the statutory aggravating factors] exists, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Subsection (c), referred to in the above quoted section, reads:

> (c) Consideration of factors in Aggravation and Mitigation. The Court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b) [the statutory aggravating factors]. Mitigating factors may include but need not be limited to the following: [various statutory mitigating factors are listed].

Ill. Rev. Stat. 1981, ch. 38, par. 9-1(c).

This comparison reveals, that like the Georgia statute, the Illinois procedure requires that the jury find the existence of at least one of the statutory aggravating factors before the defendant can be sentenced to death. Also, like the Georgia scheme, Illinois then allows the jury to consider any relevant aggravating or mitigating factors in deciding whether to impose the death sentence. In addition, as this Court found to be true of the Georgia statute in Zant, the Illinois statute does not require that the jury give any special weight to any aggravating circumstances.

A second important similarity between the Georgia procedure and the Illinois statute relates to the provisions for review. In Zant, this Court noted that its determination that general, non-statutory aggravating factors may be considered in imposing the death penalty, depended in part, upon the existence under the Georgia statute, of mandatory appellate review. The

Illinois statute also mandates automatic review of all death sentences. Ill. Rev. Stat. 1981, Ch. 38, par. 9-1(i). In fact, both the Illinois Supreme Court Rules, Ill. Rev. Stat. 1981, Ch. 110A, par. 603, and the Illinois Constitution of 1970, Art. 6, Section 4, also require automatic review of all death sentences.

In summary, there simply is no reason for this Court to grant certiorari to review the Illinois statute with respect to the issue of consideration of non-statutory aggravating factors. The decisions of this Court approving the pertinent aspects of the Georgia statute control the questions of the propriety of the Illinois statute with respect to that issue.

When one considers the instructions given by the court to the jury in this case, it becomes equally clear that the judicial guidance given for consideration of non-statutory and statutory aggravating factors (as well as mitigating factors) comports very well with the Eighth and Fourteenth Amendment requirements as laid down by Gregg v. Georgia, Zant v. Stephens, and Barclay v. Florida. The sentencing hearing in this case was conducted separately after the defendant had been found guilty. (R. 7796). That sentencing hearing was then conducted in two distinct phases.

In the first phase, the jury was instructed that they would have to find beyond a reasonable doubt the existence of at least one of the two possible statutory aggravating factors before the defendant could be sentenced to death. (R. 8002). In the second phase, after the jury found both aggravating factors to exist (R. 8015, 8016), the court instructed the jury that they should consider any relevant aggravating and mitigating factors including statutory mitigating factors, in determining whether the death penalty should be imposed. (R. 8441-8443). The court also instructed the jury that aggravating factors are those which provide reasons for imposing a sentence of death and mitigating factors are those which provide reasons for not imposing the death sentence. (R.

8442). The jury was not instructed, as apparently argued by the Petitioner (Petition at 15), that they were required to consider specific evidence.

This procedure and these instructions convincingly demonstrate that the jury in this case received sufficient guidance in the application of their discretion so as to meet the standards of Gregg, Zant, and Barclay. Thus, the actual instruction of the jury in this case pursuant to the Illinois statute provides no reason for granting a writ of certiorari in this case.

B.

The Evidence Which The Petitioner Claims Was Irrelevant And Inflammatory Was Properly Admitted And, In Any Event, Does Not Raise An Issue Important Enough To Justify A Grant Of Certiorari In This Case.

The Petitioner also argues, in Point I of his petition, that certain evidence which the jury may have considered as aggravating circumstances was irrelevant and inflammatory. He contends that this alleged impropriety, together with the allegations that the Illinois statutory procedure is unconstitutional, warrants this Court's acceptance of the case on certiorari. It is not clear whether the Petitioner would argue that the alleged improper evidence, standing alone, still raises an issue sufficiently important to justify a grant of certiorari. The Respondent submits that it clearly does not.

In addition to the fact that the Petitioner has failed properly to preserve this issue (See Point I (c) infra), the Respondent submits that the testimony in question would, at best, raise a relatively minor evidentiary issue in this case, and, therefore, is not significant enough to warrant consideration by this Court on certiorari. Admittedly, the precise question of whether effects of the crime on the family of the victim are relevant as "circumstances of the offense", has not been specifically decided by this Court; and, in an appropriate context, at least some members of this Court may wish to address it. However, there are several circumstances

of this case which show that it is highly unlikely that the testimony in question could have affected the outcome of the death penalty hearing in this case. Thus, the issue is not crucial enough to the controversy so as to be in a desirable posture for review by this Court.

First, as argued separately below, the objection necessary to raise this question was never made in the trial court (R. 8054-8061). Secondly, the particular effects on the surviving victim and the family of the deceased victim, in large part, were not any worse than that which the jury could be expected to surmise, using their own common sense. It would defy human experience to think that jurors do not envision such tragic circumstances in considering the seriousness of a defendant's crime. Indeed, as noted in a different context below, the Petitioner's failure to object may well have been a tactical decision. He may have wanted to use cross-examination to minimize the jury's impressions as to the deleterious effects on the surviving victim and the family of the deceased victim.

A third fact, which shows that the testimony was unlikely to have had an inflammatory effect upon the jury, is that it was presented in a very neutral and detached manner through a probation officer who had conducted a pre-sentence investigation at the insistence of the Petitioner. That same witness presented rather broadly ranging evidence (R. 8084-8097), including background information on the Petitioner, some of which was favorable to the Petitioner. The testimony under attack was but a part of that presentation.

A fourth reason why the testimony as to the effects of the crime was not crucial in this case is that it never became a focal point in the sentencing hearing. The only reference by the prosecutor to the testimony in question, was made during a brief comment by one of the prosecutors in response to the Petitioner's emotional plea for mercy (R. 8408). In that context, it certainly can be argued that the effect of the Petitioner's murderous conduct is at least as relevant as his emotional plea for mercy. A reading of the prosecutor's

closing remarks in total (R. 8360-8408) clearly indicates that there were many other appropriate circumstances upon which the prosecution dwelt. The evidence in question was not unduly emphasized.

In addition to these several facts which show that the testimony under attack was highly unlikely to have affected the jury's verdict, there is another reason why this issue is not appropriate for review on certiorari. This Court has previously noted that it is desirable for the states to determine what may constitute aggravating or mitigating circumstances so long as there is sufficient guidance in making the death sentence decision. California v. Ramos, ____ U.S. ____, 103 S. Ct. 3446 (1983); Gregg v. Georgia, 428 U.S. 153, 192 (1976). The Illinois legislature has determined that the effects of the crime upon the victims should be included in all pre-sentence investigations, such as the one which constituted the basis for the testimony under attack in this case. Ill. Rev. Stat. 1979, Ch. 38, par. 1005-3-2(a)(3). Certainly, as any person who has had occasion to observe or deal with the families of homicide victims becomes poignantly aware, they too are victims of the crime in any true meaning of the word. Indeed, it is the instantaneous, devastating and permanent loss of a loved one to those by whom they are loved which is, in large measure, responsible for the extreme repugnancy society feels toward the crime of murder. Not many of us dread dying as much as we do the specter of losing a loved one or leaving loves behind through the instantaneous violence of a homicide.

Thus, Respondent suggests that this Court should continue in its view that the substantive factors to be considered once the case has been properly qualified for the death penalty, is better left to the states. The Petitioner had an adequate opportunity to litigate the issue, to the extent it was raised, before the Illinois courts. People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 241 (1983). Further review on certiorari is not warranted.

A final factor supporting the Respondent's position that this issue is not appropriate for review is that the substantive claim made by the Petitioner is not meritorious. Properly presented, as it was, the effects of the Petitioner's crime upon the surviving victim, and upon the family of the deceased victim, was relevant evidence.

This Court has made it clear that the death sentencing process must permit consideration of the:

> [C]haracter and record of the individual offender and the circumstances of the particular offense as a constitutionally indisposable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Moreover, this Court also stated in Gregg:

> We think that the Georgia Court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far ranging argument [citation omitted]. So long as the evidence introduced and the arguments do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Gregg v. Georgia, 428 U.S. 153, 203-204 (1976).

These passages clearly illustrate this Court's commitment to the belief that the difficult human decision involved in a death penalty case is best developed through a broad-scoped hearing. Certainly the effects of the Petitioner's murderous conduct upon Lori Rowe, who was fortunate enough to survive his attempt to kill, and the effects upon the family of Bonnie Serpico, fall well within the common sense meaning of the phrase "circumstances of the particular offense."

It is wholly appropriate for sentencing tribunals to begin to take into greater account the needs and concerns of society, particularly of those persons most directly injured by the offender's conduct. This societal need was astutely recognized by this Court in Gregg v. Georgia when Justice Stewart, expressing the opinion of this Court, stated:

> The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.
>
> In part, capital punishment is expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law.'

Gregg v. Georgia, 428 U.S. 153, 183 (1976)

Proof of the effects of the Petitioner's crime upon the families of the deceased is a proper consideration in a death penalty hearing in light of the legitimate purpose of the death penalty as a lawful channeling of society's need for retribution. To ignore such facts is to ignore a significant basis of society's moral outrage against these repugnant murders.

That is not to say that facts about the effects on the deceased's family should be the focal point of the jury's attention in a death penalty hearing. The Respondent merely asserts that it is proper and relevant testimony which was not unduly emphasized in this case.

In summary, the Respondent submits that the totality of the circumstances of this case strongly suggest that the Court should not grant a writ of certiorari to consider the evidentiary question involving the testimony as to the effects of the Petitioner's crime on the family of the deceased and the surviving victim. It was at most a minor issue in a lengthy trial and hearing. It would raise a substantive issue best left to the states to resolve. And, finally, it was relevant evidence which was not unduly emphasized by the prosecution.

C.

The Petitioner's Failure To Object In The Trial Court To The Alleged Irrelevancy Or Inflammatory Nature Of The Testimony Relating To The Effects Of The Crime Upon The Surviving Victim And The Family Of The Deceased Is Reason Enough For This Court To Deny A Writ Of Certiorari On That Issue. Likewise, His Failure to Argue Either In The Trial Court Or Before The Illinois Supreme Court, That Consideration Of Non-Statutory Aggravating Factors Violates The Eighth And Fourteenth Amendments Is Reason To Deny The Writ Of Certiorari On That Issue.

The Petitioner has not properly preserved for review either of the arguments made in Point I of his Petition. With respect to the claim that consideration by the jury pursuant to Illinois statute, of non-statutory aggravating factors violated the Eighth and Fourteenth Amendments, the Petitioner failed to make the argument either in the trial court or in the Illinois Supreme Court. (R. 8302-8303); People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983). It appears that this Court is not inclined under these circumstances to consider such an attack on a state statute. C.f. Illinois v. Gates, ____ U.S. ____, 103 S. Ct. 2317, 2321-25 (1983).

With respect to his argument that the probation officer's testimony relating to the effects of Petitioner's crime upon the surviving victim and the family of the murdered victim was irrelevant and inflammatory, Petitioner failed to make any such objection in the trial Court (R. 8054-8061). He did attempt to raise that issue before the Illinois Supreme Court, but it was held that he had waived the question by his failure to object. People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 240-241 (1983). Nonetheless, the Illinois court went on to discuss the testimony in question and the state of the law allowing broad leeway in the presentation of evidence at the death penalty hearing. Id.

The Respondent suggests that the Petitioner's failure to object in the trial court, even though he attempted to raise the issue in the Illinois Supreme Court, should also be considered by this Court as a basis to deny the writ of

certiorari. Cf. Estelle v. Williams, 425 U.S. 501, 508 n. 3 (1976). The record in this case is replete with evidence that the Petitioner was ably and vigorously represented by counsel at the trial of this case. It is very possible that the failure of his attorney to object to the testimony of the probation officer was a tactical decision on his part. The Petitioner had insisted on the pre-sentence investigation conducted by the probation officer and there was substantial favorable information which the Petitioner elicited from the witness. Thus, it seems apparent that the Petitioner may well have concluded that it would be desirable and more effective to elicit favorable information on cross-examination of the witness rather than attempting to bring it out through direct examination after objecting to the testimony in question. Moreover, he may have concluded that the actual impact of the crime, as elicited on cross-examination of the witness, was not as harmful to Petitioner as that which the jury would surmise in the absence of such testimony. In any event, having not given the trial court the opportunity to remedy any alleged error in the testimony, the Petitioner should not be allowed to litigate the question on certiorari.

II.

THE ILLINOIS SUPREME COURT REVIEW PROCEDURE IN DEATH PENALTY CASES COMPLIES WITH THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A brief reading of the Illinois Supreme Court's opinion in this case should demonstrate rather convincingly that the Illinois Supreme Court takes seriously its responsibility to thoroughly examine the record in death penalty cases so as to provide a check against the freakish or capricious imposition of the death sentence about which the Court was concerned in Furman v. Georgia, 408 U.S. 289 (1972). Moreover, the opinion in this case, as well as the other opinions of the Illinois Supreme Court in death sentence cases, reveal indisputably that the court also engages in a comparative review of all cases in

which the death penalty was imposed, so as to determine whether the circumstances underlying a given death sentence are so out of line with other death penalty cases as to indicate an aberrant decision by a jury or judge. See People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 242-243 (1983); People v. Brownell, 79 Ill.2d 508, 404 N.E.2d 181, 199 (1981). Finally, a review of the Illinois Supreme Court death penalty cases will also reveal that that Court does not hesitate to reverse a death sentence on such grounds. E.g. People v. Carlson, 79 Ill.2d 564, 404 N.E.2d 233 (1980); People v. Gleckler, 82 Ill.2d 145, 411 N.E.2d 849 (1980).

The Respondent submits that the actions of the Illinois Supreme Court in this case, as well as in other Illinois death penalty cases, clearly establishes that its practice and procedure comply with the requirements of the Eighth and Fourteenth Amendments as discussed in Gregg v. Georgia, 428 U.S. 153, 204-207 (1976). This Court's assessment of the role of the Georgia appellate review procedure is equally true of the Illinois system.

> [It] serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Gregg v. Georgia, 428 U.S. 153, 206 (1976).

The Petitioner's claim that this issue warrants consideration by this Court in this case falls far short of the mark. Notwithstanding his unsubstantiated conclusions and bold assertions of fact not of record, it should be rejected.

III.

THE FACT THAT ILLINOIS ALLOWS THE PROSECUTOR TO MAKE THE DECISION WHETHER TO SEEK THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Petitioner's efforts to distinguish the application of this Court's approval, in Gregg v. Georgia, of the Georgia statute's grant of discretion to the prosecutor, from the discretion allowed to the prosecutor under the Illinois statute, at best, amounts to a distinction without a meaningful difference. Although apparently conceding that this Court has sustained the validity of pre-trial prosecutorial discretion in bringing about a death penalty prosecution, Petitioner argues that to the extent the Illinois prosecutor can make that discretionary decision after a defendant is convicted, such discretion violates the "capricious imposition" requirements of the Eighth and Fourteenth Amendments.

The Respondent submits, however, that the relationship of the prosecutorial discretion to the charging of a substantive crime, as opposed to the seeking of the sentence after conviction, was not significant to this Court's reasoning approving such discretion in Gregg v. Georgia. Justice Stewart, writing for this Court, noted that relatively unguided discretion to remove a defendant from consideration for the death sentence exists in some entity or another both before and after convictions. Gregg v. Georgia, 428 U.S. 153, 199 (1976). The thrust of this Court's approval of such discretionary authority is that it may be employed to spare a person from the death penalty, but not to impose the death penalty. It is this latter authority to which the Eighth Amendment need for guidance is addressed. In seeking a death penalty hearing, a prosecutor does not impose the death penalty. All the safeguards of the Eighth Amendment remain between that stage and the ultimate decision. In not seeking the death penalty, at worst, a person who would have received the sentence is spared. The normal requirements of proving a

discriminatory practice would be sufficient to check any abuse of that discretion.

Justice White, in a separate opinion in Gregg v. Georgia, (and concurred in by the Chief Justice and Justice Rehnquist), noted that the argument attacking the prosecutorial discretion in that case is, "in the final analysis an indictment of our entire system of justice" and is unsupported by any facts to show abuse of the discretion. Gregg v. Georgia, 428 U.S. at 225-227. The same assessment can be made of the Petitioner's argument in this case.

Although he attempts to distinguish the Illinois statute by stating that the Illinois prosecutor does not have to refuse to charge a crime in order to avoid seeking the death penalty, that distinction is also without merit. Contrary to Petitioner's assertion at page 25 of his Petition, the capricious or ill-motivated decision by an Illinois prosecutor not to seek the death penalty would indeed be a breach of his duty and of the public trust.

Once again, there is no basis in fact for the assertion that the prosecutorial discretion at issue will be or has been abused. Petitioner's illustrative comparison of this case with People v. LaPointe (Petition at 24) certainly fails to establish any such abuse. The prosecutor in LaPointe (who happened to be the same prosecutor as in this case) may well have reasonably concluded that a jury or judge would not impose the death penalty on a young-looking, 18 year-old defendant with much stronger evidence of a real drug dependency life-style than that involved in the Free case, together with all the other circumstances in the case.

IV.

THE PETITIONER'S CLAIM THAT THE PROTECTIVE SWEEP OF HIS PREMISES VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS RAISES PRIMARILY, IF NOT SOLELY, A FACTUAL ISSUE RATHER THAN AN ISSUE OF CONSTITUTIONAL LAW.

Petitioner apparently concedes that "the concept of a protective sweep has been endorsed as a valid exception to the Fourth Amendment's warrant requirement because of the need for police officers to ensure their own safety or to seek out accomplices, due to the 'potentiality of danger surrounding the arrest.'" (Citation omitted) (Petition at 25). He then argues that the facts in this case do not meet the criteria for that exception. However, in affirming the trial judge, the Supreme Court of Illinois found that the Petitioner had to be tear-gassed out of his house and that:

> The officers knew that defendant had used a gun in the commission of the crimes. His brother-in-law had told the police that the defendant carried a handgun in his truck. When the defendant was captured, he did not have the gun. Although there was no evidence that the defendant had an accomplice in the commission of the crimes, one officer testified that he saw someone at both the front and back windows of the house before the defendant came out, and he could not be sure if both were the same person. Thus, the officers had knowledge that a violent crime had been committed, that the gun used had not been recovered, and that someone was possibly in the house who would have access to the weapon. There was a potentiality for danger surrounding the arrest which justified the "protective sweep" of the house.

People v. Free, 447 N.E.2d at 227.

The Court went on to find that, in fact, the police entered the house only for the limited purpose of the protective sweep. Id. This finding corresponded to the finding of the trial judge. Id.

The Respondent submits that the facts as found by the state courts clearly justified the application of the "protective sweep" exception. Even Petitioner would have difficulty disagreeing with that proposition. The Petitioner merely disagrees with the finding of fact that the protective sweep

was the reason for the entry by the police. He has had an full and fair opportunity to litigate this issue before the Illinois courts. It is essentially a factual question, and does not warrant further review by this Court.

Finally, Respondent points out that in addition to the classic protective sweep facts justifying the entry by the police in this case, there was an independent, though related, justification for the entry. As the Illinois Supreme Court found, having fired the tear gas cannister into Petitioner's house, "the police had an obligation to enter the premises, and determine whether there were persons present who either were in danger or posed a substantial danger to the police." People v. Free, 447 N.E.2d at 226. The Court went on to find that the police did enter the house for these reasons. People v. Free, 447 N.E.2d at 226-227. Since these "public service" exigencies, which do not fall into the classic "protective sweep" theory, also justified the entry in this case, it would not constitute an appropriate controversy in which to litigate the validity and scope of the "protective sweep" exception.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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August 26, 1983.

No. 82-6881

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JAMES P. FREE, JR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

CERTIFICATE OF SERVICE

I, Michael B. Weinstein, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 160 North LaSalle Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Alexander Stevas, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served.

I further state that this mailing took place on August 26, 1983.

BY: Michael B. Weinstein
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SUBSCRIBED and SWORN to before me this 26th day of August, 1983.

NOTARY PUBLIC